Filed 5/12/10 In re C.A. CA5

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**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| In re C.A. et al., Persons Coming Under the Juvenile Court Law. | |
| MERCED COUNTY HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>D.R.,<br><br>Defendant and Appellant. | F059093<br><br>(Super. Ct. No. JV27973)<br><br>**O P I N I O N** |

**THE COURT**[*]

APPEAL from orders of the Superior Court of Merced County. Harry L. Jacobs, Commissioner.

Kathleen Murphy Mallinger, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and James B. Tarhalla, Senior Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before, Levy, Acting P.J., Cornell, J., and Kane, J.

## INTRODUCTION

Appellant, D.R., appeals from the juvenile court's order denying her petition pursuant to Welfare and Institutions Code section 388 to modify the court's prior order terminating reunification services for her children, C. and F.[1] The court summarily denied appellant's petition without a hearing and terminated her parental rights as to C. and F. Appellant contends she demonstrated a prima facie case of changed circumstances and the juvenile court abused its discretion in denying her petition. She further contends the strong sibling relationship makes it in the minors' best interest to remain together. We reject these contentions and will affirm the juvenile court's judgment.

## FACTS AND PROCEEDINGS

### *Earlier Proceedings*

In March 2009, then four-year-old C., two-year-old F., and nine-month-old R. were taken into protective custody by the Merced County Human Services Agency (agency) because of neglect. At the time, the children were living with appellant and her husband J.R., the father of R. and stepfather of C. and F.[2] The whereabouts of C.'s alleged father, G.A., and F.'s alleged father, F.R., were unknown.

At the detention hearing, appellant identified F.R. as F.'s biological father. Appellant and F.R. were never married. Appellant asserted there was a paternity test showing F.R. to be R.'s biological father although he did not sign a declaration of paternity. F.R. was not living with appellant when R. was born. F.R. was incarcerated in state prison. F.R. told social workers he lived with appellant at the beginning of her pregnancy with R., but left her before R. was born. F.R. did not sign a declaration of

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

2 In a separate proceeding, J.R. was receiving reunification services for R.

paternity and is not listed on R.'s birth certificate. As of March 2009, F.R. had last seen R. a year and a half earlier.

The agency filed a dependency petition on the children's behalf, alleging appellant exposed them to an unhealthy and unsafe environment. There was a space heater in close proximity to a curtain, numerous bags of dirty laundry on the floor, cockroaches crawling down the walls of each room, dog feces and urine on the carpet and on the children's mattress, and medication within the children's reach. The agency also alleged appellant continued to expose the children to this environment despite having received 24 months of family reunification and family maintenance services from December 2006 to December 2008.[3]

The children were medically evaluated, found to be underweight, and diagnosed with failure to thrive. They were placed together in foster care.

In April 2009, at the jurisdictional hearing, the juvenile court adjudged the children dependents of the court. F.R. made his first appearance and the court appointed him an attorney. The court also ordered appellant to complete a psychological evaluation to see if she could benefit from services and set the matter for disposition.

Appellant completed the first of two psychological evaluations in April 2009. The examining psychologist found appellant's overall intellectual functioning and adaptive skills approximate to that of an 11- to 12-year-old. The psychologist diagnosed appellant as having borderline intellectual functioning. He also concluded she suffers from mental impairment with developmental delays and opined it was "highly unlikely" she would benefit from reunification services.

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**3** Appellant had a prior dependency proceeding for C. that began in March 2006 and ended with dismissal of the proceeding in November 2008. Appellant received reunification and family maintenance services during this time.

The second psychologist who evaluated appellant agreed with the first, noting that appellant's intellectual deficits are at the core of appellant's personal impairments. The second psychologist found that although appellant is not mentally retarded, she has intellectual deficits that result in significantly impaired problem solving abilities and poor judgment. Appellant further suffers from a mood disorder, drug abuse, and characterologic disorder that render her unable to care for or control her children. He noted all three children suffered from a failure to thrive as a result of malnourishment and the parents' failure to interact with them. In the second psychologist's opinion, appellant's intellectual and psychological problems were significant enough to render her unlikely to benefit from services in the "foreseeable future."

In light of the psychologists' opinions, the agency recommended the court deny appellant reunification services as to all three children pursuant to section 361.5, subdivision (b)(2) on the grounds she suffers a mental disability that prevents her from benefitting from services. The agency also recommended the court deny F.R. and G.A. services because, as alleged fathers, they are not entitled to them. (§ 361.5, subd. (a).) However, the agency recommended the court grant services to R.'s father, J.R.

At the conclusion of a contested hearing on July 16, 2009, the juvenile court followed the agency's recommendations. Appellant filed a writ petition for review of the juvenile court's rulings. On September 23, 2009, we issued our opinion denying appellant's petition.

***Section 388 Petition***

The agency filed its report for the section 366.26 hearing on November 3, 2009. C. and F. had weekly visits with appellant. Appellant was attentive toward the children. F.R. had visited F. three times between July 2009 and October 2009. The children had been in a single placement and remained together.

The report noted C. and F. fell within the 0-5 year age group that most prospective adoptive parents want to adopt. Both children were healthy, prospective adoptive parents

were found for them, and it was likely they would be adopted by their prospective adoptive parents. R. was also residing with the same prospective adoptive parents but was in a reunification plan with his father. The prospective adoptive parent for the other two children was willing to continuing sibling visits if R. was moved into another placement. The agency recommended adoption for C. and F.

The permanency plan hearing was continued twice in November 2009. On December 9, 2009, the hearing was continued one more day because appellant's counsel had not received the agency's report.

On December 10, 2009, appellant filed a petition pursuant to section 388 seeking to change the court's denial of reunification services. Appellant alleged she pursued services on her own and followed the case plan proposed by one of the psychologists. Appellant asserted that she made substantial progress in all areas and was ready to receive her children back into her home.[4] Appellant stated she was married, could provide a stable home for her children, and would be receiving R. in her home in a month with family maintenance services. Appellant alleged it would be better for the minors to maintain their sibling group.

At the section 366.26 hearing on December 10, 2009, the juvenile court stated it had read appellant's petition. The court found there was an argument for changed circumstances. The court, however, did not see anything that provided evidence that a change of the court's order would benefit the minors. The court found that even if appellant could argue the best case scenario that there is a change in circumstances, there

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[4] Attachments to the petition stated appellant had attended five parenting classes, was attentive in class, and was receiving mental health services twice a month since June 2009. A report from appellant's drug and alcohol program, however, stated she attended an initial appointment and kept most of her appointments, but dropped out of and discontinued the program.

was nothing in the petition to satisfy the other prong that a change in the court's earlier order would be in the minor's best interest.

Appellant's counsel argued appellant had met the minimum standard for calendaring the petition. The court disagreed and summarily denied appellant's section 388 petition. The section 366.26 hearing was continued until December 15, 2009. Appellant reargued her section 388 petition. Counsel for the minors was in support of the agency's recommendation, not to provide services to appellant.

There was argument concerning whether R. was going back to his parents or if he was staying in foster care. The court noted the agency's report stated the parents were receiving reunification services for R. but there was no indication he was being returned to the parents at that time. The court found C. and F. were adoptable, ordered adoption as the permanent plan for the minors, and terminated the parental rights of the parents.

**DISCUSSION**

Appellant argues the court abused its discretion by denying her section 388 petition. We disagree.

It was appellant's burden of proof to show there was new evidence or there were changed circumstances that made a change of the children's placement in their best interest. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).) The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*).) The petition must be liberally construed in favor of its sufficiency. (*Ibid.*)

The references in *In re Marilyn H.*, *supra*, 5 Cal.4th at page 310, to a "prima facie" showing is not an invitation to section 388 petitioners to play "hide the ball" in pleading changed circumstances or new evidence. A "prima facie" showing refers to

those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 6.) If a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

The mandate for liberal construction of a section 388 petition does not entitle a petitioner to avoid describing the changed circumstances or new evidence. Section 388 and the pertinent rule of court (Cal. Rules of Court, rule 5.570) require the petition to allege changed circumstances or new evidence that requires changing a prior order. (*Jasmon O., supra*, 8 Cal.4th at pp. 398, 415.) As the moving party, it was appellant's burden of proof by a preponderance of the evidence to show there was new evidence or there were changed circumstances that called for a change of the previous order denying reunification and that reunification services would be in the children's best interest. (§ 388; *Stephanie M., supra*, 7 Cal.4th at p. 317.)

Appellant argues the juvenile court erred in summarily denying her petition without a hearing. Appellant, however, showed only that her circumstances may have been changing, not that her circumstances had changed. Although appellant voluntarily attended parenting classes and obtained mental health services, she dropped out of a drug and alcohol program. There was no allegation or showing in the petition that appellant addressed the intellectual impairments that led to the juvenile court's dispositional order denying her reunification services. Liberally construing appellant's petition, including the attachments to it, we find that appellant failed to establish changed circumstances. At best, appellant showed changing circumstances.

The juvenile court correctly found that even if appellant had an argument justifying changed circumstances, she failed the second prong of what she had to show in

her petition. The parent bears the burden of showing in a section 388 petition both a change of circumstance exists *and* that the proposed change is in the best interests of the child. A petition only alleging changed circumstances, which would lead to a delay in the selection of a permanent home, to see if a parent could eventually reunify with a child at some future point, does not promote stability for the child or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Appellant's contention regarding the best interests of her children was that the children would benefit from staying in the same sibling group. The only evidence before the juvenile court was that C. and F. were going to be adopted by their current caregiver and R. was receiving reunification services with his father, who was still married to appellant. Although appellant asserted that she was going to regain custody of R., this was not proven at the hearing. The juvenile court noted that R.'s father was receiving reunification services, but there was no evidence either parent was regaining custody of R. All three minors were staying with the same caregiver at the time of the section 366.26 hearing, and the caregiver was willing to continue visitations between all three children if R.'s placement changed.

Appellant argues in her reply brief that she only had to make a prima facie showing and needed a hearing to prove that she was going to regain custody of R. Even if appellant could have shown in a hearing that she was going to regain custody of R., the court did not have to set a hearing on appellant's section 388 petition based on the conclusory allegation appellant should maintain the sibling group. Appellant's petition failed to make a prima facie showing that maintaining the sibling group in her custody was in the best interests of the children. Furthermore, the evidence before the juvenile court was that all three children had the same caregiver and the caregiver was willing to continue visitations between the children if R.'s placement changed.

To understand the element of best interests in the context of a section 388 petition, we look to the Supreme Court's decision in *Stephanie M.* After the termination of

reunification services, a parent's interest in the care, custody, and companionship of his or her child is no longer paramount. Rather, the focus shifts, once reunification efforts end, to the child's needs for permanency and stability; there is in fact a rebuttable presumption that continued out-of-home care is in the best interests of the child. (*Stephanie M., supra,* 7 Cal.4th at p. 317.) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Ibid.*)

Notably, both here and in the juvenile court, appellant ignores the children's need for permanence and stability in advocating her position. Neither the juvenile court nor this court, however, may do so. Appellant failed to make a prima facie showing in her petition of changed rather than changing circumstances and that continuing services would be in her children's best interest.

**DISPOSITION**

The juvenile court's orders denying appellant's section 388 petition and terminating her parental rights are affirmed.